United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-70

To be argued by
RICHARD deY. MANNING

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

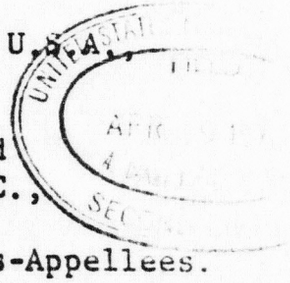
THE SANKO STEAMSHIP CO., LTD.,

Plaintiff-Appellant,

-against-

NEWFOUNDLAND REFINING COMPANY, LIMITED,
NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A.,
PROVINCIAL BUILDING COMPANY LIMITED,
PROVINCIAL REFINING COMPANY LIMITED,
PROVINCIAL HOLDING COMPANY LIMITED and
SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Defendants-Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS
Appellees

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FOR THE SECOND CIRCUIT

THE SANKO STEAMSHIP CO., LTD.,

Plaintiff-Appellant,

-against- 76-7060

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Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

STATEMENT OF THE CASE

The Defendants-Appellees (Defendants) accept the statement of the case contained in the brief of the Plaintiff-Appellant (Plaintiff).

ISSUE PRESENTED

Does the existence of a forum selection clause in a charter party agreement, designating a jurisdiction other than New York as the forum in which all disputes between the parties shall be determined, require the dismissal of an action brought in the United States District Court in New York, thereby precluding the utilization by the Plaintiff of the provisional remedy of attachment provided by New York law?

POINT I

UNDER BREMEN V. ZAPATA OFF-SHORE OIL CO. (407 U.S. 1 [1971]) THE COMPLAINT MUST BE DISMISSED AND ATTACHMENT DENIED

The policy clearly expressed by the Supreme Court of the United States in Bremen v. Zapata Off-Shore Oil Co., 407 U.S. 1 (1971) is that in the absence of a showing that enforcement of a forum selection clause would be unreasonable, such a clause will be enforced for all purposes relating to the dispute and the parties will be left to the bargain they made. No question exists in the instant case that the enforcement of such a clause would be unreasonable and unjust or that the clause is invalid, and consequently it must be enforced. Defendants contend that enforcement of the clause requires dismissal of the complaint and the consequent denial of an attachment under New York law.

The District Court in its memorandum and order of March 4th, 1976, noted that the plaintiff's claim of right to an attachment was based upon §6201 of the New York State CPLR. (A 73)* The Court recognized, however, that the section relied upon required that there be a pending action to provide the underpinnings of an attachment.** Concluding that Bremen v.

* Unless otherwise indicated, figures in parenthesis refer to pages in the Joint Appendix.

** §6201 CPLR provides in pertinent part as follows:

"An order of attachment may be granted in any action,... where the plaintiff has demanded and would be entitled,... to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state;" [emphasis supplied]

Zapata, supra, precluded the maintenance of such an action because the agreements sued upon contained identical clauses designating the English Courts as the forum in which any disputes arising under them should be determined, the District Court dismissed the complaint, denied the motion for attachment and vacated a Temporary Restraining Order. We submit that the action of the District Court was correct in all respects.

The District Court held the decision in Bremen v. Zapata Off-Shore Oil Co., supra, to be controlling in a situation where, as here, the parties have included in their contract a "forum selection" clause.

In Bremen, the "forum selection" clause was quoted as follows:

> "Any dispute arising must be treated before the London Court of Justice." (407 U.S. at 2)

In the instant Charter Parties, the "forum selection" clause reads as follows:

> "40(a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.
> "(b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree whatever their domicile may be.
> "Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the Arbitration Act, 1950...." (A31, A43 & A56, lines 375-383)

At the outset, it should be noted that in Bremen, the Court had before it a dispute between an American corporation,

Prior to March 4, 1976, several hearings were had

Zapata, and a foreign ship, The Bremen, and its owner, Unterwesser, a German corporation. The fact that one of the parties was a United States corporation was heavily relied upon by the single dissenting Justice. Here, both parties to the agreement are foreign corporations and the vessels in question are of foreign registry.

It should also be noted that the Bremen decision was rendered prior to the date of execution of the charter parties here in question, August 8, 1972, and such a far-reaching decision would have been known to plaintiff's counsel at the time the instant charter parties were executed. While numerous alterations were made in the forms of charter parties used, no change whatsoever was made in the "forum selection" clause. A point considered of some importance in Bremen:

> "...Zapata made numerous changes in the contract without altering the forum clause, which could hardly have escaped its attention. Zapata is clearly not unsophisticated in such matters." (407 U.S. 14, n. 15)

In Bremen the Court held that "forum selection" clauses

> "...are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." (407 U.S. at 10)

According to Bremen, the "forum selection" clause was prima facie valid, and the burden of proof was on plaintiff to show that enforcement was unreasonable. As we have previously noted, plaintiff has failed to make any showing that enforcement of the "forum selection" clause would be unreasonable and unjust or that the clause was invalid.

Plaintiff unsuccessfully argued before the District Court, and argues here, that the Court should permit the attachment and stay the proceedings pending the decision by the English Courts or arbitration in London.

This argument flies squarely in the face of the decision in Bremen where the plaintiff argued the same point and lost:

> "For the first time in this litigation, Zapata has suggested to this Court that the forum clause should not be construed to provide for an exclusive forum or to include in rem actions. However, the language of the clause is clearly mandatory and all-encompassing;..." (407 U.S. at 20)

If an in rem action will not lie in the face of a forum selection clause, a fortiori, a writ of attachment will not lie.

The Plaintiff, a Japanese company, bargained for English law and an English Court or an English arbitration of its disputes with its charter, a Newfoundland company, and plaintiff should not now be permitted to invoke the jurisdiction of this Court to intervene in any way in this purely foreign matter.

As the Court in Bremen further held:

> "Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser [the corporate owner of Bremen] might happen to be found.[15] The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting." [Emphasis supplied]

"[15] At the very least, the clause was an effort to eliminate all uncertainty as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves. Moreover, while the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English Courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law..." (407 U.S. at 13-14; emphasis supplied)

Unterweser appealed this decision and the same [illegible]

Here the parties not only selected the English Courts as the exclusive forum, but they also went beyond the clause in Bremen and provided that the charter would be construed in accordance with English law and, most importantly:

> "...the relations between the parties determined in accordance with the law of England."

It should be clear that such "relations between the parties" include any provisional remedies which may be available, including the attachment sought by plaintiff herein.

Bremen v. Zapata has been applied by the First and Ninth Circuit Courts of Appeals so as to require dismissal of the complaint where an action has been brought in a United States District Court in violation of a "forum selection" clause. Thus, in Fireman's Fund v. Puerto Rico Forwarding Co., 492 F.2d 1294 (CA1 1974), the Court affirmed a judgment of the United States District Court in Puerto Rico (Sylvester J. Ryan, J.) dismissing the complaint for lack of jurisdiction on the basis of a "forum selection" clause contained in the defendant's bill of lading designating state or federal courts located in New York City as the forum for any actions brought under such bills.

Similarly, in Republic International Corporation v. Amoco Engineers Inc., et al, 516 F.2d 161 (CA9 1975), the Court reversed the trial court's denial of a motion to dismiss based upon a "forum selection" clause stating:

> "...we hold that this action should have been dismissed because of the forum selection clauses in the construction contracts, which provide

> that suit must be brought in the courts of Uruguay. This holding follows the reasoning of the Supreme Court in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed. 2d 513 (1972); see Roach v. Hapaq-Lloyd, 358 F.Supp. 481 N.D.Cal. 1973); Jack Winter, Inc. v. Koratron Co., 326 F.Supp. 121 (N.D.Cal. 1971)."

In that case, a default judgment had been entered against the Ministry of Public Works, Republic of Uruguay, one of the defendants, following the District Court's denial of the motion to dismiss.

In Gaskin v. Stumm Handel, 390 F.Supp.361 (S.D.N.Y. 1975) the District Court not only dismissed the complaint on the ground of a "forum selection" clause but also vacated an attachment which had been granted by the New York Supreme Court prior to removal of the action to the District Court.

Forum selection clauses also provided the ground for the dismissal of complaints in Spatz v. Nascone, 364 F.Supp. 967 (W.D.Pa. 1973) and Roach v. Hapaq-Lloyd A.G., 358 F.Supp. 481 (N.D.Cal. 1973).

In sum, the parties contracted for a determination by the English Courts of the relations between them arising out of the charters. Of necessity, such relations would include the right to and the circumstances under which the remedy of attachment would lie in favor of one party against the other. Bremen v. Zapata, supra, requires that such an agreement must be enforced in the absence of a showing, not even attempted here, that enforcement would be unreasonable. Enforcement of

In T. S. Keaty v. Freeport Indonesia, Inc., 503 F.2d 955 (5th Cir. 1974), the pivotal clause provided:

> "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York."

The differences between the clause just quoted and those contained in the agreements now before the Court and in the Bremen case are obvious. Thus, as the Court pointed out, the contract in Keaty did not clearly limit actions brought upon it to the courts of a specified locale. This distinction was noted by the Court in comparing the clause with the one in Bremen, and formed the basis for its decision that the "forum selection" clause was not mandatory and that the District Court was in error in refusing to accept jurisdiction. We submit that there can be no question as to the mandatory nature of the clause before the Court in this action which provides:

> "Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree whatever their domicile might be***."

In Carbon Black Export v. S.S. MONROSA, 254 F.2d 297 (5th Cir. 1958), decided long before Bremen, the Court refused to enforce the "forum selection" clause and consequently never reached the question of maintaining security while the action proceeded in Genoa. Under the circumstances, the District Court's holding regarding security cannot be accorded any weight as controlling precedent.

foreign forum selection clause. In other words, security

Plaintiff also relies on Indussa Corporation v. S.S. RANBORG, 260 F.Supp. 660 (SDNY 1966) reversed 377 F.2d 202 (2nd Cir. 1967), which was also decided prior to Bremen. There, this Court refused to enforce a "forum selection" clause and accordingly never reached the issue of security which had been voluntarily posted.

It is interesting to note, however, that in Wm. H. Muller & Co. Inc. v. Swedish-American Line Ltd., 224 F.2d 806 (2nd Cir. 1955), this Court foreshadowed the holding of the Supreme Court of the United States in the Bremen case by enforcing a "forum selection" clause and affirming a judgment of the District Court declining jurisdiction and dismissing the complaint.

Plaintiff urges that the decision of the District Court in Kooperativa Forbundet, Stockholm v. Vaasa Line Oy, Partenreederei M.S. Ursula Jacob, and the S.S. Ursula Jacob, etc. (1975 A.M.C. 1972, unreported elsewhere) represents a proper disposition of the problem at hand, and one which Judge Knapp should have adopted in the instant case. The decision in Kooperativa might appear at first blush to be contrary to the result reached by the District Court in Gaskin v. Stumm Handel, supra, where the Court dismissed the complaint and vacated an attachment granted by the State Court prior to removal to the District Court. Upon analysis, however, it will be seen that the decision in Kooperativa is not in

Asturias Shipping Company, S.A. 193 F.Supp. 195 (S.D.N.Y.

conflict with that of Judge Knapp or the Court in Gaskin v. Stumm Handel, supra. In Kooperativa, there were two defendants, one, the carrier, and the other, the shipowner. The Court, on the authority of Bremen, noted that it would be bound to enforce the "forum selection" clause which was contained in the carrier's bill of lading. It further appears that although the defendant shipowner was not a party to the bill of lading, the Court determined that because the action against the defendant carrier required dismissal on the authority of Bremen, the proper exercise of discretion compelled dismissal as to the shipowner as well. The Court, however, conditioned the dismissal upon the requirement that both defendants submit to the jurisdiction of the Courts of Finland and that the defendant shipowner, alone, deposit a bond in Finland equal to that posted in the District Court. Significantly, the defendant carrier, in whose favor a "forum selection" clause existed, was not required to deposit security of any sort. Apparently, whatever rights the plaintiff may have had against the defendant carrier regarding security were left for determination by the Courts of Finland. Defendants contend that any such rights the Plaintiff may have here can only be determined in England.

Plaintiff also relies upon Hatzoglou v. Asturias Shipping Company S.A., 193 F.Supp. 195 (S.D.N.Y. 1961), Brillis v. Chandris (U.S.A.) Inc., 215 F.Supp. 520 (S.D.N.Y. 1963) and Garris v. Compania Maritima San Basilio, 261 F.Supp. 917 (S.D.N.Y. 1966), aff'd 386 F.2d 155 (2nd Cir. 1969) in each of which the complaint was dismissed on the ground that the forum selected was inappropriate. The cases, however, are

a vessel or instituting an action seeking to attach other

inapposite because none involved a forum selection clause, and in the latter two cases, security was voluntarily given. Moreover, these cases, like all the other cases cited by Plaintiff, are defective as controlling or persuasive authority because in not one of them did the right to security depend upon compliance with §6201 of the New York CPLR. The Plaintiff here has asserted such a right but because of the required dismissal of the complaint cannot meet the statutory prerequisite of a viable action.

Plaintiff's concern that the prospective denial of the right of attachment in actions such as this will irreparably affect maritime and admiralty practice is a matter which the United States Supreme Court must have found less compelling than the considerations which led it to its decision in Bremen, where it held that the "forum selection" clause was all-encompassing, and included in rem actions.

The claim urged by the Plaintiff that sections 3 and 8 of the Federal Arbitration Act have been rendered meaningless by the decision below is equally without merit. In the first place, security was sought here under §6201 of the New York CPLR and not the Federal Arbitration Act. Secondly, if it were an arbitration proceeding, it would of necessity have been brought in England and by the terms of the contract, all the relations of the parties, including the right to security, would be

nating an arbitrator, directing that arbitration proceed

determined under English law. Finally, it must be assumed that the Supreme Court was aware of these sections when it rendered its decision in Bremen and determined that the policy decisions underlying that decision outweighed any effect that such decision might have on the Federal Arbitration Act. In any case, it would appear that by the use of careful draftsmanship in the preparation of contracts, the rights granted under the Federal Arbitration Act can be preserved.

CONCLUSION

For all of the foregoing reasons, the decision of the District Court dismissing the complaint, denying Plaintiff's motion for attachment and vacating the Temporary Restraining Order should be affirmed in all respects.

Respectfully submitted,

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Service of Three (3) Copies of the within Brief admitted this 9th day of April 1976

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by [illegible]

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